

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

NOV 11 0 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding

)
)
)
)
)
)

PP Docket No. 93-253

Comments of Cellular Communications, Inc.

CELLULAR COMMUNICATIONS, INC.

Thomas J. Casey
David H. Pawlik
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Its Attorneys

Dated: November 10, 1993

No. of Copies rec'd
List ABCDE

CA 9

TABLE OF CONTENTS

	<u>PAGE</u>
Summary	ii
I. CCI SUPPORTS THE COMMISSION'S TENTATIVE DECISION TO USE PUBLIC ORAL BIDDING AS ITS BASIC AUCTION METHOD.	1
II. PUBLIC ORAL AUCTIONS IN THE PERSONAL COMMUNICATIONS SERVICES ARE SIMPLE, EFFICIENT, AND FAIR.	3
III. THE ADDITION OF SEALED BIDS UNDERMINES THE EFFECTIVENESS OF PUBLIC ORAL AUCTIONS.	7
IV. SEALED BIDS ARE NOT NECESSARY FOR AGGREGATION.	9
V. FEWER SAFEGUARDS ARE REQUIRED WITH PUBLIC ORAL AUCTIONS.	12
Conclusion	17

Summary

Cellular Communications, Inc. ("CCI") supports the Commission's decision to use public oral auctions as its primary method of allocating licenses that are subject to competitive bidding. Oral auctions are a simple, proven, and effective method to determine the actual market value of a property and award it to the party that values it most highly. In areas such as Personal Communications Services ("PCS"), the auctions can be most effective if the smallest "lots" possible are put up for auction and aggregation of both spectrum bands and geographic territory are accomplished through bidding, subject to limits set by the Commission's rules. Combinations of auction methods, especially those involving sealed bids, are likely to distort the process and create undesired consequences. Because of the inherent efficiency in oral auctions, fewer safeguards are necessary than in other allocation methods. The Commission should require only a short form application prior to auction and should demand a substantial deposit from all auction participants and prompt, full payment from all auction winners.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED

NOV 11 0 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding) PP Docket No. 93-253
)

To: The Commission

Comments of Cellular Communications, Inc.

Cellular Communications, Inc. ("CCI"), by its attorneys,
respectfully submits its comments in response to the Notice of Proposed Rule
Making ("Notice") issued in the above-captioned proceedings to implement
competitive bidding in the awarding of licenses for the radio spectrum.

I. CCI SUPPORTS THE COMMISSION'S TENTATIVE DECISION TO USE PUBLIC
ORAL BIDDING AS ITS BASIC AUCTION METHOD.

CCI supports the Commission's tentative decision to choose public
oral (English) auctions as its primary method for awarding spectrum licenses.

One year ago CCI stood practically alone among parties commenting in the Personal Communications Services ("PCS") proceeding when it advocated the procedure that the Commission has ultimately chosen.¹ In its Notice, the Commission discusses a multitude of proposals for conducting auctions. While under certain circumstances at least some of the options could potentially enhance the proceeds received or the efficiency of the process, CCI respectfully suggests that the Commission should not allow the perfect to become the enemy of good. The Commission should choose the form and rules for competitive bidding that, on balance, are most likely to capture the fair value of the auctioned spectrum for the public while allocating resources efficiently, quickly, and with a certainty that bolsters confidence in the Commission's processes.

Although spectrum auctions may be "new and uncharted territory"² for the Commission, the use of auctions to allocate items of uncertain value is not.³ Auction houses like Sotheby's and Christie's use oral auctions almost daily to award works of art, valuable antiques, and distinctive real estate properties.⁴

¹ *Comments of Cellular Communications, Inc.* in GEN Docket No. 90-314, ET Docket No. 92-100, Amendment of the Commission's Rules to Establish New Personal Communications Services at 20-27 (Nov. 9, 1992).

² Notice at ¶ 176.

³ Auctions were used in Holland at least as early as 1658. See Schama, *The Embarrassment of Riches* (Knopf, 1987).

⁴ Christie's conducted its first auction on December 5, 1766.

The process awards the property to the party that values it most highly, thus maximizing both market efficiency and the return to the seller. A fair auction simultaneously determines the actual market value of a property by allowing all interested parties to publicly state its worth to them. The rules the Commission should adopt are those which are necessary to provide these results. All other regulations create unnecessary regulatory burdens, needlessly restrict potential participants from the process, and create the risk of embroiling the Commission in a morass of complaints and litigation.

II. PUBLIC ORAL AUCTIONS IN THE PERSONAL COMMUNICATIONS SERVICES ARE SIMPLE, EFFICIENT, AND FAIR.

The Commission's establishment of Personal Communications Services ("PCS") presents an excellent opportunity to employ the newly granted authority to conduct auctions. PCS meets all of the criteria set for the use of competitive bidding and the new service is unimpaired by preexisting license allocations.

In general, in order to have auctions that are simple, efficient, fair, and capable of rapid execution, the Commission should conduct oral auctions of relatively small "lots" (i.e., spectrum/geographic area combinations) that, to the extent possible, are homogenous. This would facilitate the flow of information

and reduce the transaction costs of obtaining it. It would permit the market (at the auction or in the aftermarket) to determine the economic aggregation of lots, rather than relying on the accuracy of the Commission's predictive powers. Finally, it would further the Commission's goal of lowering the entry level for participation in the auction process.

These considerations apply to the specific case of PCS auctions. In its Report and Order in its proceeding to establish rules for PCS, the smallest lot that the Commission has identified is the Rand McNally Basic Trading Area ("BTA") with a 10 MHz bandwidth.⁵ Rand McNally organizes BTAs into larger, roughly state-sized Major Trading Areas ("MTA"s).

A simple approach to PCS auctions would be to begin in one frequency band at the Eastern end of the country and to auction off all BTAs within each MTA before moving to the next MTA. The process would continue, moving across the country geographically from East to West, then moving in the opposite direction for the next band.⁶

⁵ Amendment of the Commission's Rules to Establish New Personal Communications Services ("PCS Order") (Rel. October 22, 1993).

⁶ With 492 BTAs and twelve 10 MHz spectrum blocks, this would require 5,904 auctions, a large number, but certainly not overwhelming and feasible by the standards of commercial auction houses. If the spectrum blocks were increased in size to 20 Mhz, the number of individual auctions would drop to 2,952. The proposal in the Notice requires 2,562 separate auctions plus additional sealed bid rounds. The Commission could schedule the auctions by frequency band, with a few days between each in order to

(continued...)

However, in its PCS Order, the Commission has already aggregated both spectrum (into one 20 MHz and two 30 MHz frequency bands) and geography (into MTAs in frequency bands A and B). With the system proposed by CCI, the market would decide the best size for each frequency assignment and each geographical service area and the Commission would not be in the position of making decisions that could needlessly hinder the natural growth of this important new service. Furthermore, it would be entirely coincidental if Rand McNally's methods for grouping BTAs into MTAs universally corresponded with the business judgment of potential PCS operators. Although CCI does not believe that this prior aggregation maximizes public interest benefits, if the Commission proceeds with aggregated "lots," then CCI would apply its proposal of open bidding for these lots as well, with any further aggregation becoming a function of the marketplace.

The Commission has actually gone further; it suggested combinatorial bidding within the A and B frequency bands and solicited comment on applying it to the other bands. If the Commission decides to facilitate aggregation in this manner, rather than letting the market decide the appropriate

⁶(...continued)

enable potential bidders to assimilate the results of the prior rounds. If all spectrum blocks auctioned are the same size, the order in which they are scheduled for auction would not matter (other than for purposes of contiguity), but if blocks of different sizes are presented, larger blocks should be scheduled first to aid in system planning.

combinations of spectrum and geographic areas, it should have only one level of aggregation (e.g. BTA to MTA, or MTA to national). The Commission should use sealed bids for the "combined" lot and the sealed bids should be opened before the oral auctions of the constituent elements.⁷

Finally, if the Commission persists in the dual aggregation that it suggested and allows bidding for all 51 30 MHz blocks at once, it should also clarify the relationship between this decision and its opinion in the PCS docket restricting cellular providers to 10 MHz of PCS spectrum in any market where they provide cellular service.⁸ The Commission should explain that, in aggregated bidding, qualification standards, especially the population service limits placed on cellular carriers, apply to the aggregate service area for which the bid is placed and not separately to each individual market.

⁷ This method, however, brings with it the significant deficiencies of sealed bids discussed in Section III, *infra*.

⁸ The Notice states that sealed bids would be accepted "for all 51 licenses" in the 30 MHz blocks as a group. Notice at ¶ 120. The PCS Order states that cellular carriers are eligible to hold licenses for more than 10 MHz of PCS spectrum only "in areas where their cellular service area covers less than 10 percent population of the respective MTA or BTA PCS service area's population." PCS Order at ¶ 106. The juxtaposition of these two decisions effectively eliminates cellular carriers for submitting combinatorial bids on all 51 MTAs if their service area encompasses more than 10 percent of the population of any one MTA.

III. THE ADDITION OF SEALED BIDS UNDERMINES THE EFFECTIVENESS OF PUBLIC ORAL AUCTIONS.

In an oral auction, participants are instantaneously aware of competing bids.⁹ This continuous feedback facilitates the discovery of the true market value of the spectrum. In sealed bidding, without such feedback, some participants are apt to overbid for properties of significant import to them, while other will submit bids lower than their perceived value of the property in a deliberate attempt to avoid the "winner's curse."¹⁰ Either case injects economic inefficiencies into the process.

Because of the inherent economic efficiency of public oral bidding, the Commission should be extremely wary of schemes that would use different bidding methodologies. Each other method of bidding has its own weaknesses

⁹ The same advantages would be present in simultaneous electronic bidding, which would allow participants to monitor bidding in all spectrum blocks within a geographic area and in adjacent areas and adjust bids accordingly. Oral auctions have the apparent advantage of requiring no investment by the Commission in the new technology that would be required to implement a system of electronic bidding.

¹⁰ Under this theory, the value of an item won in a sealed bid auction is the amount bid by the second highest bidder. The surplus amount over the second highest bid is known as the "winner's curse." See Kagel and Levin, "The Winner's Curse and Public Information in Common Value Auctions," 76 American Economic Review, 894-920 (Dec. 1986).

which the Notice recognized.¹¹ Even combinations of bidding methods should be suspect because the interaction of methods within a hybridization will distort the market process. For example, in any process that involves more than one type of bidding, the Commission must choose which type prevails. Bidders will not take the first round of bidding seriously, but will use it to provide misinformation about themselves if possible. The Commission's proposal for what might easily become a six step process for auctions of 30 MHz MTA blocks in PCS represents an opportunity for this kind of undesirable outcome.¹²

No rational party would submit a sealed bid in the first round that represents its true maximum valuation of the spectrum property. Without

¹¹ The Commission has examined the four basic methods of bidding and commented on the problems that each pose in its Notice, at ¶¶ 36-45. The sole weakness the Commission found with public oral bidding is the possibility of collusion among bidders in situations where there are few bidders. The Commission speculates that bidders could get together prior to the auction and agree which party would win. However, in the special circumstance of spectrum auctions under the Commission's proposed rules, if competitors were actually able to cooperate to this extent, they could just as easily decide not to submit competing mutually exclusive applications and there would be no auction at all for the spectrum in question. Neither scenario is sufficiently likely in the highly competitive communications industry to warrant one of the admittedly less efficient alternative bidding methods.

¹² It appears that under the Commission's proposal, parties would present sealed bids for all of the Block A licenses in the aggregate, a separate oral auction would be conducted for each of the 51 MTAs within the block, and if the sealed bid is higher than the combined oral bids, the winners of the first round would have the opportunity to submit a "final best offer" sealed bid. Then these steps would be repeated for Block B. Notice at ¶ 120.

information regarding the value to competitors, it would not risk overbidding.¹³

The first round would actually be a competition for the right to make a bid in the final, decisive round. Similar game-playing would take place in the oral bidding, with parties jockeying for the right to make a final round bid while trying not to give away accurate information about the actual value they place on the property. Only the "final best offer" round would be a true auction. It would contain all the disadvantages of sealed bids in general, with fewer participants it would be less competitive, and because bids are made secretly and the round is open only to two parties, it represents a greater opportunity for collusion than any other bidding method considered by the Commission.

IV. SEALED BIDS ARE NOT NECESSARY FOR AGGREGATION.

There is no need for sealed bids to foster aggregation, either geographically or across the spectrum. If contiguous "homogenous" blocks of spectrum are more valuable to a party in the aggregate than separately, bidders will demonstrate this on the auction floor. In cases where aggregation is deemed to be likely or desirable, the Commission should begin oral auctions with the most populated markets first and continue in the order of decreasing market size.

¹³ See Notice at ¶ 41.

Thus a winner in a major market seeking to aggregate markets or spectrum for a regional service will know quickly which areas are available for such services. If another party has plans for an adjacent suburban or rural market, this could increase the cost of the smaller markets with a resulting boon to the federal treasury. In an oral auction bidders will not take their bids above the point where they can purchase the spectrum and operate the service profitably.

The addition of sealed bids, like some potent "wonder drugs," creates side effects more severe than the initial symptoms. Prior to oral auctions each bidder must determine the value of the spectrum to itself. In a sealed bidding situation, each must also attempt to determine the value to every other potential participant because if those values are much lower a bid in the amount of the actual value would cost the winner more than it would have to. Without the information sharing that takes place at an oral auction, these estimates can never be made with a high degree of confidence. The bidding will then be made more unreliable as bidders grapple with this uncertainty.¹⁴

Sealed bidding also complicates the implementation of spectrum limits and presents unnecessary challenges to structuring the most cost effective

¹⁴ The Commission has apparently recognized that a sealed bid system will add significant delay to spectrum auctions. Otherwise there would be no need to develop a mechanism for withdrawing sealed bids prior to their opening because of changes in market and technological conditions. Notice at ¶ 108.

combinations of markets and spectrum.¹⁵ In services where the Commission would allow aggregation but not specify the areas that can be aggregated, the result would be an unmanageable daisy chain. The Commission would have to somehow compare bids for dissimilar market combinations that overlap in areas to determine which aggregations out of potentially thousands of possibilities, represents the maximum return for the public.¹⁶

If the Commission finds that it must complicate matters by introducing a sealed bidding round into auctions for aggregated PCS spectrum blocks, the sealed bids for the aggregated blocks should be opened prior to the oral bidding for individual blocks. Parties who submitted sealed bids could still enter oral bidding for individual blocks if they find that the sealed bids were not high enough to earn the desired spectrum. This would eliminate the need for a "last best offer" round that would introduce needless uncertainty and pointlessly complicate the process, and will seem unfair to winners of oral bidding.

¹⁵ E.g., in PCS parties are limited to a maximum of 40 MHz of spectrum in any given PCS market. If sealed bids for some blocks and markets must be placed prior to the opening of sealed bids and the determination of winners in others, participants may end up winning properties they cannot afford or cannot legally hold. At the very least, the process makes it extremely difficult for a participant to formulate plans for service areas and to budget accordingly.

¹⁶ In the alternative, the Commission would have to dictate the boundaries of aggregatable territory which may not coincide with the participants' concepts of the most efficient configuration.

V. FEWER SAFEGUARDS ARE REQUIRED WITH PUBLIC ORAL AUCTIONS.

Congress gave the Commission a remarkably short period in which to develop and implement a new system for spectrum distribution. Given the acknowledged efficiency of oral auctions in accomplishing the Congressional intent, the fastest, surest, and safest course is to simplify the rules and streamline the process.

For example, although Congress required the Commission to prescreen auction participants to determine that their applications are "acceptable for filing," it provided the Commission with a great deal of flexibility in determining exactly what an applicant must provide prior to entering the bidding.¹⁷ Although such a requirement is not mandated by the statute, the Commission has proposed that applicants be required to submit both a short and long form application prior to bidding. It further suggests that the long form may not even be read except for those tied to the ultimately successful bid.¹⁸ The Commission is certainly correct when it suggests that its precious resources would

¹⁷ The Commission has effectively dealt with similar requirements before, as in cellular lotteries, where an initial short-form "postcard" transmittal sheet was used. Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 59 R.R. 2d 407, 409 (Memorandum Opinion and Order on Further Reconsideration, 1985).

¹⁸ Notice at ¶ 97.

be wasted in a review of mutually exclusive applications that cannot all be successful. It is an equally wasteful expenditure of the resources of communications providers to require the completion of costly, time consuming applications that will never be read. Other problems with this procedure lurk in the wings and might require a wholesale reevaluation of the Commission's complete inventory of applications. For example, the Commission's Form 401, used by mobile service providers, requires complex and detailed engineering studies based on specific sites. A requirement for complete 401 applications from all auction participants would create a landoffice business for engineering consultants and owners of real estate who would be able to sell several options on the same property knowing that only one buyer would actually have use for a site. Furthermore, a requirement of full site and engineering studies as part of the preliminary applications would discourage the entry of new entities to the industry.

If the requirement of long form applications is intended to discourage speculation, it would be unnecessary with oral auctions accompanied by a meaningful deposit. An oral auction is the most effective disincentive to speculation possible because, unlike a sealed bid auction, it is most likely to capture the full value of the license leaving no margin for potential profit from a quick turn around by a speculator. The Commission should keep the pre-auction

application process as simple as possible. If preceded or accompanied by a proper deposit, the short form application should be no more than: (1) a declaration of the real party in interest in the bidding entry; (2) a certification that such party is legally, technically, and financially qualified to be a licensee pursuant to the applicable rules; and (3) a legally binding statement that the person actually placing the bids has the authority to commit the real party in interest to a bid up to a specific ceiling.¹⁹ If preceded or accompanied by a proper deposit, this "short form" application should be accepted up to the hour when actual bidding commences.²⁰

The requirements of substantial pre-auction deposits and prompt payments eliminate the need for other less effective measures that would drain the resources of applicants and the Commission alike. To this end, CCI supports the Commission's proposal for substantial "upfront payments" by cashier's check, immediately refundable to all but the winning bidder. Further safeguards would be added by a required payment of the complete amount of the winning bid within a very short time. The interval between the rap of the auctioneer's gavel

¹⁹ The Commission should prescribe the form for this statement so that it will be enforceable in all states, territories, and possessions.

²⁰ Established auction houses conduct oral auctions on a regular basis with a simple registration procedure and require payment within a matter of days. In effect, by registering, the bidder is affirming an understanding of the terms and conditions of the auction, including eligibility, and the ability and willingness to pay a winning bid.

and the submission of payment should be only the minimum time required to secure a cashier's check or an electronic transfer of funds in the amount of the winning bid. Even if financing is required for a winner's payment, if arrangements have already been made prior to the auction, final details could be settled in less than five business days. The requirement of prompt, complete payment of winning bids would eliminate the need for any additional deposits by auction winners and further simplify the process.

The Commission's proposal for calculating the "upfront payment" based on spectrum size and population is an effective method of balancing entry requirements with the reasonable value of the spectrum subject to the auction. However, without a minimum upfront payment that represents an amount too precious to wager, the door is open to frivolous bidders who could distort the auction process or spoilers intent only on raising the costs of competitors. The Commission should adopt a minimum upfront payment of \$10,000 with the understanding that all amounts above the winning bid would immediately be refunded to the high bidder. Bidders should understand that these deposits will be taken and cashed. If a payment is made too close to the auction time than necessary to guarantee that a check clears, the Commission should require it to be

made by some obviously assured means, such as a certified check from one of the nation's fifty largest banks.²¹

²¹ The Commission has responded to a Congressional directive to provide opportunities for small businesses, minorities, and women by deciding to create "set aside" blocks within the PCS spectrum for Designated Entities. Having restricted eligibility and thus assuring entry into the service by such entities, the Commission achieves no public interest benefit by offering preferential auction terms. Special provisions that in effect simply lower the price paid would apply to all such entities, including those with significant resources or access to capital. Consequently, with regard to payment terms and deposits, all participants should be treated equally.

Conclusion

For all these reasons, CCI respectfully submits that the Commission can most effectively recognize its goal of introducing competitive bidding to the allocation of radio frequencies by 1) relying on public oral auctions, 2) allowing participants to aggregate through the auction process, 3) simplifying pre-auction procedures, and by requiring 4) substantial deposits from all participants and 5) prompt full payment of all winning bids. CCI believes that these procedures will lead to an effective and efficient allocation process.

Respectfully submitted,

CELLULAR COMMUNICATIONS, INC.

By: _____
Thomas J. Casey
David H. Pawlik
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Its Attorneys

Dated: November 10, 1993